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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH MELVIN BAILEY,

Defendant and Appellant.

D051913

(Super. Ct. Nos. SCD199832,  
SCD202322)

APPEAL from a judgment of the Superior Court of San Diego County, David J.

Danielson, Judge. Judgment affirmed as modified.

Joseph Melvin Bailey appeals a judgment entered after he pleaded guilty to five counts alleged in two separate informations. He contends the trial court (1) abused its discretion in denying his request for probation and (2) erred by not staying the sentence on one of the charges under Penal Code section 654 (all statutory references are to this code).

We agree that the court should have stayed Bailey's sentence on the specified charge and order the judgment be modified to stay that sentence. We otherwise affirm the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Case Number SCD199832

In 2006, Bailey contracted with the San Diego Padres baseball team to purchase advertisement space at the Padres's ballpark, but he did not make any payments and owed the Padres \$47,500. Although he gave the Padres a check for \$12,000 to pay for the advertising, it was returned for insufficient funds. On two separate occasions, Bailey entered Brandywine Liquor and cashed checks for \$1,600 and \$1,500 that were later returned for insufficient funds.

An information was filed charging Bailey with grand theft (count 1) and uttering an insufficient funds check (count 2) for his acts toward the Padres. It also charged two counts of uttering an insufficient funds check (counts 3-4) and commercial burglary (count 5) for Bailey's acts toward Brandywine Liquor. The information further alleged that Bailey was ineligible for probation based on prior convictions.

### B. Case Number SCD202322

In 2005, Bailey falsely represented to Conley Broome and 77-year-old Evelyn Jones that he had a contractor's license. He accepted a \$1,000 check from Jones to install a bathtub and cashed the check without doing the work. Bailey contracted to remodel Broome's home, but abandoned the project after Broome had paid him \$122,000. Unpaid subcontractors hired by Bailey placed liens on Broome's property and Broome refinanced

the property to pay the \$58,630 debt. He also received an estimate that it would cost an additional \$60,000 to complete the remodel.

An information charged Bailey with residential burglary (count 1) and theft of over \$400 from an elderly person (count 2) and the misdemeanor offense of contracting without a license (count 18) for his conduct toward Jones. The information also charged him with 15 counts of residential burglary (counts 3-17) for his conduct toward Broome. The information further alleged that he was ineligible for probation based on prior convictions.

#### C. The Plea Agreement and Sentencing

Bailey pleaded guilty to counts 1 and 2 in case number SCD199832 (respectively, grand theft and uttering an insufficient funds check) and counts 2, 3 and 18 in case number SCD202322 (respectively, theft of over \$400 from an elderly person, burglary of Broome and contracting without a license). In return, all other counts in the informations were dismissed. At the hearing, the court confirmed that no other promises had been made to Bailey and the district attorney's office could argue any sentence, but there was an agreement that if Bailey made a "serious effort" to pay a "substantial amount" of restitution, the district attorney's office "would not be offended" by a grant of probation.

At a later sentencing hearing, Broome testified that he had lost over \$100,000 and that Bailey had made several unfulfilled promises to repay him. Defense counsel told the court that Bailey would be delivering a \$20,000 check to Broome within the next seven days and asked the court to continue the hearing. The court indicated that it was inclined to send Bailey to prison, but ultimately continued the hearing for about three weeks to give Bailey the opportunity to make the promised restitution payment to Broome.

At the continued sentencing hearing, defense counsel had a \$6,000 check to present to Broome, but the prosecutor in case number SCD202322 argued that the amount did not constitute "substantial" restitution and recommended a prison term. The prosecutor in case number SCD199832 also requested a prison term, stating that although Bailey had paid full restitution to Jones and Brandywine Liquor, there were no known payments to the Padres.

The trial court denied probation, finding that other than making false promises, Bailey was not serious about paying restitution. It sentenced Bailey to a total of five years eight months in state prison, consisting of the middle term of four years on count 3, a consecutive one-year term on count 2, and a concurrent six-month term on count 18 in case number SCD202322. In case number SCD199832, Bailey received a consecutive eight-month term on count 1 and a concurrent eight-month term on count 2.

## DISCUSSION

### *I. Denial of Probation*

Bailey contends the trial court abused its discretion when it denied probation because the terms "substantial amount" and "serious effort" are ambiguous and any ambiguity must be resolved in his favor. We disagree.

Probation is an act of clemency, not a matter of right. (*People v. Wardlow* (1991) 227 Cal.App.3d 360, 365.) The trial court has broad discretion to grant or deny probation and we will not set aside a decision to deny probation absent a clear showing that the trial court abused its discretion. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) A court abuses its discretion when its order "exceeds the bounds of reason, all of the

circumstances being considered." (*Ibid.*) The burden is on the defendant to clearly show that the denial of probation was irrational or arbitrary. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.)

Here, Bailey's prior felony convictions made him presumptively ineligible for probation. The trial court, however, exercised its discretion to treat the case as "unusual" (§ 1203, subd. (e)(4)), to allow it to consider probation with the understanding that Bailey must pay a substantial amount of restitution. At the sentencing hearing, Bailey still owed restitution of \$47,500 to the Padres and \$65,000 to Broome. The trial court impliedly considered the amount of restitution paid and the \$6,000 check to Broome to be insubstantial and it is not our function to substitute our judgment for that of the trial court. Nor do we consider the term "substantial" to be ambiguous. The trial court's act of continuing the sentencing hearing to give Bailey the opportunity to present Broome a promised payment of \$20,000 makes it clear that the trial court and counsel considered such a payment would have constituted "substantial" restitution.

After hearing the arguments of counsel, the trial court also considered the significant loss to the victims and Bailey's criminal background, prior performance on probation and earlier false promises to pay restitution to the victims. On this record, the court's decision to deny probation was not an abuse of discretion.

## II. *Section 654*

In case number SCD199832, the trial court sentenced Bailey to a consecutive eight-month term on count 1, grand theft of \$47,500 between April 3 and June 23, 2006, for his failure to pay for the advertisement space at the Padres's ballpark. It also ordered

a concurrent eight-month term on count 2, uttering a \$12,000 insufficient funds check to the Padres during the same time period.

The parties agree, and we concur, that the trial court violated section 654 by failing to stay imposition of sentence on count 2 because Bailey had the same criminal objective on counts 1 and 2 – to defraud the Padres by not paying for advertising space. (*People v. Diaz* (1967) 66 Cal.2d 801, 806 [section 654 prohibits the imposition of multiple sentences where a course of conduct pursuant to a single objective violates more than one statute].) We thus modify the judgment to stay the imposition of sentence on that count.

#### DISPOSITION

The judgment is modified to stay imposition of sentence on count 2 in case number SCD199832. As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment to reflect the modification and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

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McINTYRE, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.